No. 95-1187

Supreme Court, U.S.
FILED
FEB 23 1996
CLERK

In The

Supreme Court of the United States

October Term, 1995

BERKS COUNTY, PENNSYLVANIA, *et al.*,

Petitioners,

v.

MERRY J. MURTAGH, *et al.*,

Respondents.

On Petition For Writ Of Certiorari
To The Commonwealth Court Of Pennsylvania

BRIEF IN OPPOSITION OF RESPONDENTS BOYERTOWN AREA SCHOOL DISTRICT, *ET AL.*

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QUESTIONS PRESENTED FOR REVIEW

1. Is jurisdiction lacking under 28 U.S.C. §1257(a) because no final state court judgment exists?

2. Can petitioners obtain review of the Commonwealth Court of Pennsylvania's ruling in *Greenwich Township* v. *Murtagh*, 659 A.2d 1083 (1995), on the ground that *National Private Truck Council, Inc.* v. *Oklahoma Tax Comm'n*, 115 S. Ct. 2351 (1995), requires dismissal of this suit when (a) the Commonwealth Court in the decision immediately below did not address the issue decided in *National Private Truck Council* and (b) petitioners can obtain prompt dismissal based on *National Private Truck Council* in state court after this Court denies review?

3. Is this an appropriate case in which to grant review of the Commonwealth Court's ruling on the subject of municipal liability?

PARTIES TO THE PROCEEDING

The respondents joining in this Brief in Opposition are Boyertown Area School District, Daniel Boone Area School District, Exeter Township School District, Fleetwood Area School District, Governor Mifflin School District, Hamburg Area School District, Kutztown Area School District, Muhlenberg School District, City of Reading School District, Schuylkill Valley School District, Twin Valley School District, Wilson School District, Wyomissing Area School District, Greenwich Township, Marion Township, Brecknock Township, Centre Township, Maxatawny Township, Borough of Bechtelsville, Borough of Kenhorst, Leesport Borough, Colebrookdale Township, Cumru Township, Muhlenberg Township, Upper Bern Township, Conrad Weiser School District, Borough of Wyomissing Hills, Borough of Birdsboro, Borough of West Reading, Township of Heidelberg, Township of Lower Heidelberg, Township of Oley, Township of Tilden, Township of Upper Tulpehocken, Township of Douglass, Borough of Kutztown, Borough of St. Lawrence, Borough of West Lawn, Borough of Hamburg, Borough of Laureldale, Oley Valley School District, Borough of Centerport, Upper Bern Township and Caernarvon Township.

The foregoing respondents have no parent companies or subsidiaries to list pursuant to Rule 29.6.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES iv

OPINION BELOW 1

JURISDICTION 2

STATEMENT OF THE CASE 3

ARGUMENT 8

I. Berks County And The Berks County Board of Assessment Appeals Will Be Able To Obtain The Prompt Dismissal Of This Suit In State Trial Court Now That This Court Has Confirmed That State Courts Are Barred From Entertaining 42 U.S.C. §1983 Tax Challenges 9

II. This Court Should Not Grant Review To Determine Whether Municipalities And School Districts Can Be Held Liable In A 42 U.S.C. §1983 Tax Challenge For The Allegedly Unconstitutional Property Tax Assessment Practices Of The Berks County Board Of Assessment Appeals 10

A. In light of this Court's recent decision holding that state courts should not entertain 42 U.S.C. §1983 tax challenges, it is unimportant that this issue be definitively resolved 10

B. The Commonwealth Court's ruling is correct 12

CONCLUSION 16

TABLE OF AUTHORITIES

Page

CASES

Behe v. *Chester County Bd. of Assessment Appeals*, 952 F.2d 66 (CA3 1991) 11

City of St. Louis v. *Praprotnik*, 485 U.S. 112 (1988) 12-14

Fair Assessment in Real Estate Ass'n, Inc. v. *McNary*, 454 U.S. 100 (1981) 7

Garrett v. *Bamford*, 582 F.2d 810 (CA3 1978) 11

Greenwich Township v. *Murtagh*, 659 A.2d 1083 (Pa. Commw. Ct. 1995) ..... *passim*

Greenwich Township v. *Murtagh*, 144 Pa. Commw. 624, 601 A.2d 1352 (1992) 4, 5, 11

Monell v. *Department of Social Servs.*, 436 U.S. 658 (1978) 12

Murtagh v. *County of Berks*, 535 Pa. 50, 634 A.2d 179 (1993), *cert. denied*, 114 S. Ct. 1397 (1994) 5-7, 10

National Private Truck Council, Inc. v. *Oklahoma Tax Comm'n*, 115 S. Ct. 2351 (1995) ..... *passim*

Oklahoma City v. *Tuttle*, 471 U.S. 808 (1985) 12

Pembaur v. *City of Cincinnati*, 475 U.S. 469 (1986) 12, 13, 15

UNITED STATES CONSTITUTION

U.S. CONST. art. VI, cl. 2 10

U.S. CONST. amend. XIV, §1 3

TABLE OF AUTHORITIES – Continued

Page

STATUTES

28 U.S.C. §1257(a) ..... i, 2

42 U.S.C. §1983 ..... *passim*

PA. STAT. ANN. tit. 72, §5344(a) 13

PA. STAT. ANN. tit. 72, §5350f 13

COURT RULES

Sup. Ct. R. 10 8

Sup. Ct. R. 29.6 ii

BRIEF IN OPPOSITION

Respondents Boyertown Area School District, *et al.*, respectfully pray that the petition for writ of certiorari sought in this matter be denied.

OPINION BELOW

Petitioners Berks County and the Berks County Board of Assessment Appeals seek review of the opinion that the Commonwealth Court of Pennsylvania issued in this matter on May 26, 1995. That opinion is reported, *see Greenwich Township* v. *Murtagh*, 659 A.2d 1083 (Pa. Commw. Ct. 1995), and is reprinted in the appendix to the petition for writ of certiorari, App. to Pet. for Cert. 55-A to 85-A.

The Commonwealth Court's opinion addressed a single issue: whether the municipalities and school districts located in Berks County, Pennsylvania can be held liable under 42 U.S.C. §1983 for Berks County's allegedly unlawful property tax assessment practices even though, under state law, the municipalities and school districts have no power, authority or duty to assess real property located within their boundaries or to control the manner in which the Berks County Board of Assessment Appeals conducts assessments of real property.

Following the Commonwealth Court's ruling, Berks County and the Berks County Board of Assessment Appeals filed a petition for allowance of appeal seeking discretionary review in the Supreme Court of Pennsylvania. The Supreme Court of Pennsylvania dismissed the

petition for allowance of appeal in an order dated November 22, 1995. The Supreme Court of Pennsylvania's order is not yet reported but is reprinted in the appendix to the petition for writ of certiorari. App. to Pet. for Cert. 87-A.

JURISDICTION

Petitioners contend that jurisdiction exists to review the judgment of the Commonwealth Court of Pennsylvania pursuant to 28 U.S.C. §1257(a). In §1257(a), Congress conferred jurisdiction on this Court to review only "[f]inal judgments" of state courts. Respondents Boyertown Area School District, *et al.*, do not agree that the Commonwealth Court's judgment is final for purposes of §1257(a).

If this Court denies the petition for writ of certiorari, this action will return to the state trial court for further proceedings between plaintiffs Merry J. Murtagh, *et al.*, and defendants County of Berks and the Berks County Board of Assessment Appeals. Because the Commonwealth Court's judgment requires further state court proceedings, including pretrial proceedings and perhaps trial of this suit, no final judgment exists pursuant to 28 U.S.C. §1257(a).

Because jurisdiction is lacking in this Court, the petition for writ of certiorari should be denied.

STATEMENT OF THE CASE

This case began in October of 1989 when Merry J. Murtagh and several other plaintiffs brought suit against Berks County and the Berks County Board of Assessment Appeals claiming that Berks County's property tax assessment practices deprived plaintiffs of their right to equal protection of the laws as guaranteed by the Fourteenth Amendment to the United States Constitution. *See* U.S. CONST. amend. XIV, §1. Plaintiffs' complaint contained a single claim for relief pursuant to 42 U.S.C. §1983.

In June of 1990, plaintiffs filed an amended complaint naming an additional ninety-four defendants. These ninety-four defendants were all of the municipalities and school districts located in Berks County. In every other respect, plaintiffs' amended complaint was identical to their original complaint. In particular, plaintiffs' amended complaint continued to assert only a single claim for relief pursuant to 42 U.S.C. §1983.

Many of the newly added municipality and school district defendants, including the respondents that have joined in this Brief in Opposition, filed preliminary objections to plaintiffs' amended complaint. Among the grounds asserted in those preliminary objections were the following: (1) state courts in Pennsylvania are prohibited from entertaining challenges to local taxation brought pursuant to 42 U.S.C. §1983 because state law provides an adequate remedy to vindicate taxpayers' rights; and (2) the municipalities and school districts joined as defendants in the amended complaint cannot be held liable under 42 U.S.C. §1983 because, under state law, these

municipalities and school districts have no power, authority or duty to assess real property located within their boundaries or to control the manner in which the Berks County Board of Assessment Appeals conducts assessments of real property located in Berks County.

The trial court overruled all of the preliminary objections to plaintiffs' amended complaint but permitted defendants to take an interlocutory appeal. On January 9, 1992, the Commonwealth Court issued its first opinion in this matter. *See Greenwich Township* v. *Murtagh*, 144 Pa. Commw. 624, 601 A.2d 1352 (1992) (*Murtagh I*). The Commonwealth Court held that state courts must refrain from entertaining 42 U.S.C. §1983 tax challenges where state law offers a plain, adequate and complete remedy. *See Murtagh I*, 144 Pa. Commw. at 632, 601 A.2d at 1356. The Commonwealth Court also examined whether the remedies available to plaintiffs under Pennsylvania law are adequate to vindicate plaintiffs' federal rights and concluded that they are. *Id.* at 636-37, 601 A.2d at 1358-59. Accordingly, the Commonwealth Court ordered the dismissal of plaintiffs' amended complaint as to all defendants without examining the other issues that the municipality and school district defendants had raised in their appeal.

Thereafter, plaintiffs filed a petition for allowance of appeal to the Supreme Court of Pennsylvania seeking review of the Commonwealth Court's ruling in *Murtagh I*. In their petition, plaintiffs argued that federal law (in particular the Supremacy Clause of the United States Constitution) required state courts to entertain 42 U.S.C. §1983 tax challenges despite the existence of adequate

state law remedies. The Supreme Court of Pennsylvania granted discretionary review.

In *Murtagh* v. *County of Berks*, 535 Pa. 50, 634 A.2d 179 (1993) (*Murtagh II*), *cert. denied*, 114 S. Ct. 1397 (1994), Pennsylvania's highest court ruled that federal law requires state courts to entertain 42 U.S.C. §1983 tax challenges even where plain, adequate and complete state law remedies exist. Accordingly, the Supreme Court of Pennsylvania in *Murtagh II* reversed the Commonwealth Court's judgment in *Murtagh I* and remanded this case to the Commonwealth Court for consideration of the other issues the municipalities and school districts had raised in their appeal to the Commonwealth Court in *Murtagh I*.

On remand to the Commonwealth Court, the municipalities and school districts renewed their argument that they could not be held liable under 42 U.S.C. §1983 for Berks County's property tax assessment practices because state law assigned sole responsibility for those practices to the Berks County Board of Assessment Appeals. Agreeing with that argument, the Commonwealth Court held on remand that all defendants other than Berks County and the Berks County Board of Assessment Appeals had to be dismissed. *See Greenwich Township* v. *Murtagh*, 659 A.2d 1083 (Pa. Commw. Ct. 1995) (*Murtagh III*).

The Commonwealth Court ruled that only parties possessing final policymaking authority can be held liable under 42 U.S.C. §1983 for an unconstitutional governmental practice. *See Murtagh III*, 659 A.2d at 1088-89. The court concluded, with respect to Berks County's allegedly unconstitutional property tax assessment practices, that

final policymaking authority under state law resided in the Berks County Board of Assessment Appeals. *See id.*

Dissatisfied with the Commonwealth Court's ruling in *Murtagh III*, Berks County and the Berks County Board of Assessment Appeals sought discretionary review in the Supreme Court of Pennsylvania. In an order dated November 22, 1995, the Supreme Court of Pennsylvania dismissed the petition for allowance of appeal that Berks County and the Berks County Board of Assessment Appeals had filed. App. to Pet. for Cert. 87-A.

Earlier, on June 19, 1995, this Court issued its ruling in *National Private Truck Council, Inc.* v. *Oklahoma Tax Comm'n*, 115 S. Ct. 2351 (1995). This Court, citing in a footnote to the Supreme Court of Pennsylvania's ruling in *Murtagh II*, *see National Private Truck Council*, 115 S. Ct. at 2354 n.3, explained that "[w]e granted certiorari to resolve a conflict among the state courts as to whether, in tax cases, state courts must provide relief under §1983 when adequate remedies exist under state law," *id.* at 2354.

This Court proceeded to hold, in a unanimous ruling, that state courts must refrain from entertaining 42 U.S.C. §1983 tax challenges where state law provides an adequate remedy. *See National Private Truck Council*, 115 S. Ct. at 2355-57. In so holding, this Court expressly overruled the Supreme Court of Pennsylvania's decision in *Murtagh II*.[1]

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[1] The plaintiffs in *National Private Truck Council* sought declaratory and injunctive relief pursuant to 42 U.S.C. §1983, while the plaintiffs in *Murtagh* seek damages. This, however, is a

In light of this Court's recent decision in *National Private Truck Council* overruling the Supreme Court of Pennsylvania's holding in *Murtagh II*, it is clear that plaintiffs' 42 U.S.C. §1983 tax challenge against Berks County's property tax assessment practices must be dismissed. The judgment of the Commonwealth Court in *Murtagh III* dismisses all but two defendants from this suit. Given this Court's ruling in *National Private Truck Council*, the question whether the Commonwealth Court reached the right result in dismissing all but two defendants has been rendered academic, because now it is clear plaintiffs' suit must be dismissed as to *all defendants*.

Instead of granting the petition for writ of certiorari that Berks County and the Berks County Board of Assessment Appeals have filed, this Court should deny review, after which this case will return to the state trial court,

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distinction without a difference. In *Fair Assessment in Real Estate Ass'n, Inc.* v. *McNary*, 454 U.S. 100, 113 (1981), this Court explained that the same principles that required courts to refuse to entertain tax challenges brought under 42 U.S.C. §1983 seeking declaratory and injunctive relief should also lead courts to refuse to entertain tax challenges brought under 42 U.S.C. §1983 seeking damages. As the Court wrote in *McNary*:

"Petitioners will not recover damages under §1983 unless a district court first determines that respondents' administration of the County tax system violated petitioners' constitutional rights. In effect, the district court must first enter a declaratory judgment like that barred in *Great Lakes* [*Dredge & Dock Co.* v. *Huffman*, 319 U.S. 293 (1943)]. We are convinced that such a determination would be fully as intrusive as the equitable actions that are barred by principles of comity." *McNary*, 454 U.S. at 113.

where petitioners can rapidly obtain dismissal in light of this Court's ruling in *National Private Truck Council.*

ARGUMENT

As the Court of last resort exercising discretionary review, this Court accepts cases only when there are "compelling reasons" to grant review. Sup. Ct. R. 10. No compelling reasons exist here.

The first question presented in the petition for writ of certiorari is not deserving of review. The municipalities and school districts who join in this Brief in Opposition agree with Berks County and the Berks County Board of Assessment Appeals that plaintiffs' lawsuit can no longer be maintained given this Court's recent ruling in *National Private Truck Council, Inc.* v. *Oklahoma Tax Comm'n,* 115 S. Ct. 2351 (1995). Nevertheless, once certiorari is denied, Berks County and the Berks County Board of Assessment Appeals will be able rapidly to obtain dismissal of plaintiffs' lawsuit when it returns to the state trial court.

The second question presented in the petition for writ of certiorari filed by Berks County and the Berks County Board of Assessment Appeals asks whether the Commonwealth Court correctly decided that the municipality and school district defendants could not be held vicariously liable under 42 U.S.C. §1983 for the allegedly unconstitutional property tax assessment practices engaged in by the Berks County Board of Assessment Appeals. While the Commonwealth Court's ruling in *Murtagh III* plainly was correct, that decision, even if incorrect, is not deserving of review in light of this

Court's recent ruling in *National Private Truck Council* that state courts are prohibited from entertaining 42 U.S.C. §1983 tax challenges where an adequate remedy exists under state law.

Stated plainly, it no longer makes any difference whether municipalities and school districts can be held liable under 42 U.S.C. §1983 for Berks County's allegedly unconstitutional property tax assessment practices now that this Court has ruled that both state and federal courts are barred from hearing tax challenges brought pursuant to 42 U.S.C. §1983. Accordingly, the second question presented in the petition filed by Berks County and the Berks County Board of Assessment Appeals is not deserving of review.

I. Berks County And The Berks County Board of Assessment Appeals Will Be Able To Obtain The Prompt Dismissal Of This Suit In State Trial Court Now That This Court Has Confirmed That State Courts Are Barred From Entertaining 42 U.S.C. §1983 Tax Challenges

The municipalities and school districts who join in this Brief in Opposition agree with Berks County and the Berks County Board of Assessment Appeals that this Court's recent ruling in *National Private Truck Council, Inc.* v. *Oklahoma Tax Comm'n*, 115 S. Ct. 2351 (1995), requires the prompt dismissal of this suit as to all defendants. It must be noted, however, that the issue this Court resolved in *National Private Truck Council* was not before the Commonwealth Court in the decision under review.

Currently, all but two defendants have been dismissed from this suit, and the dismissal of the remaining two defendants can be obtained most expeditiously in the trial court, which is bound under the Supremacy Clause, U.S. CONST. art. VI, cl. 2, to give effect to this Court's ruling in *National Private Truck Council.*

The applicability of this Court's ruling in *National Private Truck Council* to this case is beyond doubt, as this Court has expressly overruled the Supreme Court of Pennsylvania's earlier ruling in *Murtagh II. See, e.g., National Private Truck Council,* 115 S. Ct. at 2354 n.3 (citing the Pennsylvania Supreme Court's ruling in *Murtagh II* as one of the decisions that this Court was overruling).

As the Court of last resort in this nation, this Court should reserve its precious judicial resources for cases truly deserving of review. This case plainly is not deserving of review, especially when the state trial court can easily apply *National Private Truck Council* and promptly dismiss the remaining two defendants from this suit after this Court denies the petition for writ of certiorari.

II. This Court Should Not Grant Review To Determine Whether Municipalities And School Districts Can Be Held Liable In A 42 U.S.C. §1983 Tax Challenge For The Allegedly Unconstitutional Property Tax Assessment Practices Of The Berks County Board Of Assessment Appeals

A. In light of this Court's recent decision holding that state courts should not entertain 42 U.S.C. §1983 tax challenges, it is unimportant that this issue be definitively resolved

The second question presented for review in the petition for writ of certiorari filed by Berks County and the

Berks County Board of Assessment Appeals is a question that is no longer relevant to this suit and that is destined never to arise again.

Last Term, this Court ruled in *National Private Truck Council, Inc.* v. *Oklahoma Tax Comm'n*, 115 S. Ct. 2351 (1995), that state courts are prohibited from entertaining 42 U.S.C. §1983 tax challenges where state law provides an adequate remedy. As Berks County and the Berks County Board of Assessment Appeals recognize, *see* Pet. for Cert. 16, courts that have considered the issue have held that Pennsylvania's state law remedies are adequate. *See Murtagh I*, 144 Pa. Commw. at 636-37, 601 A.2d at 1358-59; *Behe* v. *Chester County Bd. of Assessment Appeals*, 952 F.2d 66, 68 (CA3 1991); *Garrett* v. *Bamford*, 582 F.2d 810, 817 (CA3 1978).

Accordingly, the second question presented in the petition for writ of certiorari, which asks whether municipalities and school districts may be held liable in a 42 U.S.C. §1983 tax challenge for the allegedly unconstitutional tax assessment practices of the Berks County Board of Assessment Appeals, is of no importance, because this 42 U.S.C. §1983 tax challenge is no longer sustainable in state court. *See National Private Truck Council.*

For similar reasons, the second question presented will never arise again, because all of the copycat 42 U.S.C. §1983 property tax assessment challenges that plaintiffs' lawyers have brought in other counties in Pennsylvania and in other States are also now due to be dismissed, *see National Private Truck Council*, and similar suits if filed in the future will be dismissed at the outset before the merits of the dispute are reached, *see id.*

Given this Court's ruling in *National Private Truck Council*, the question whether the Commonwealth Court reached the correct result in dismissing all but two defendants has been rendered academic, because now it is clear plaintiffs' suit must be dismissed as to *all defendants*. Instead of granting the petition for writ of certiorari filed by Berks County and the Berks County Board of Assessment Appeals, this Court should deny review, which will send this case back to the state trial court, where Berks County and the Berks County Board of Assessment Appeals can rapidly obtain dismissal in light of this Court's ruling in *National Private Truck Council*.

B. The Commonwealth Court's ruling is correct

Even if this entire case were not now subject to dismissal on the ground that this Court has recently held that state courts are prohibited from entertaining 42 U.S.C. §1983 tax challenges, this Court should still refrain from granting review.

In dismissing the municipalities and school districts from this suit, the Commonwealth Court correctly ruled that liability under 42 U.S.C. §1983 for an allegedly unconstitutional government policy rests only with the final policymaking authority. *See Murtagh III*, 659 A.2d at 1088-89. The Commonwealth Court's ruling is in accord with every decision of this Court to have considered that question. *See City of St. Louis* v. *Praprotnik*, 485 U.S. 112, 123-27 (1988) (plurality opinion); *Pembaur* v. *City of Cincinnati*, 475 U.S. 469, 478-80 (1986); *Oklahoma City* v. *Tuttle*, 471 U.S. 808, 821 (1985) (plurality opinion); *Monell* v. *Department of Social Servs.*, 436 U.S. 658, 692-94 (1978).

This Court has made clear that the question of which governmental entity has final policymaking authority for a given policy is a question of state law, *see Pembaur*, 475 U.S. at 483 (plurality opinion), and has further explained that a court "would not be justified in assuming that municipal policymaking authority lies somewhere other than where the applicable law purports to put it," *Praprotnik*, 485 U.S. at 126 (plurality opinion).

Here, state law plainly and unambiguously assigns to the Berks County Board of Assessment Appeals the final policymaking authority for assessing property located within Berks County:

> "It shall be the duty of said board, in each county to which this act applies, to make and have supervision of the making of annual assessments of persons, property and occupations now or hereafter made subject to assessment for taxation for county, borough, town, township, school, poor and institution district purposes, and to make and have supervision of listing and valuation of property excluded or exempted from taxation." PA. STAT. ANN. tit. 72, §5344(a).

State law further requires the municipalities and school districts located in Berks County to use the assessments prepared by the County Board of Assessment Appeals in levying taxes. *See* PA. STAT. ANN. tit. 72, §5350f ("When the said valuations and assessments have been made, all taxation on real estate and personal assessments for county, borough, town, township, school purposes (except in cities), institution district, and poor purposes, within the limits of such county, shall be based upon such valuations and assessments.").

State law does not give municipalities and school districts located in Berks County any duty or authority to make, revise or control the assessment of real property. Rather, state law vests the power to make, revise and control the assessment of real property located in Berks County exclusively in the Berks County Board of Assessment Appeals. Because Pennsylvania's Legislature has placed the power to make, revise and control the assessment of real property exclusively in the Berks County Board of Assessment Appeals, any suggestion that municipalities and school districts have "delegated" this power (a power that the municipalities and school districts are not given by the Legislature in the first place) to the Board of Assessment Appeals is insupportable.

The Commonwealth Court correctly recognized that plaintiffs here seek to hold the municipalities and school districts vicariously liable for the allegedly unconstitutional acts of the Berks County Board of Assessment Appeals. *Murtagh III*, 659 A.2d at 1089. Under plaintiffs' theory, when the Board promulgates unconstitutional assessments, the municipalities and school districts would be liable under 42 U.S.C. §1983 for assessing taxes as required by state law, but when the Board promulgates constitutional assessments, no liability would attach to the municipalities and school districts.

The Commonwealth Court had no choice but to reject attempts to hold the municipality and school district defendants vicariously liable given the unbroken line of this Court's precedents rejecting the imposition of vicarious liability under 42 U.S.C. §1983. *See, e.g., Praprotnik*, 485 U.S. at 122 (plurality opinion) (noting that "vicarious liability would be incompatible with the causation

requirement set out on the face of §1983"); *Pembaur*, 475 U.S. at 479 ("§1983 could not be interpreted to incorporate doctrines of vicarious liability").

Because the Commonwealth Court correctly concluded that municipalities and school districts cannot be held liable for the allegedly unconstitutional property tax assessment practices engaged in by the Berks County Board of Assessment Appeals, this Court should not grant review of the second question presented in the petition for writ of certiorari filed by Berks County and the Berks County Board of Assessment Appeals.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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